PD-0711-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 9/26/2019 11:34 AM
Accepted 9/26/2019 1:12 PM
DEANA WILLIAMSON
CLERK

No. PD-711-17

MARIAN FRASER	§	**IN THE COURT OF**
	§	
v.	§	**CRIMINAL APPEALS**
	§	
THE STATE OF TEXAS	§	**OF TEXAS**

APPELLANT'S MOTION FOR REHEARING

Appellant Marian Fraser files this Motion for Rehearing and shows the Court:

Issues Presented

Appellant premises this motion for rehearing on two aspects of the majority's construction and application of the felony-murder statute, section 19.02(b)(3) of the Penal Code.

I. There should be only one test for determining whether an offense is a lesser-included offense. Yet the majority has created a different test for felony-murder. In every other instance, this Court has adopted the cognate-pleadings test as the proper method for making this determination. The policy reasons stated by the majority do not support the decision to treat felony-murder cases differently when determining what is a lesser-included offense of the "hypothetical" manslaughter charge.

II. The Court failed to fully address the ground on which review was granted by failing to consider whether felony-murder requires a separate act from the underlying felony.

The Majority Opinion

The majority held "that the cognate-pleadings test does not apply to the manslaughter exclusion in the felony-murder statute." *Fraser v. State*, No. PD-0711-17, 2019 WL 4308659, at *5 (Tex. Crim. App. Sept. 11, 2019). This is significant because the Court had previously held that a lesser-included offense of manslaughter cannot serve as the underlying felony in a felony-murder prosecution, but the Court had never before undertaken to define how a court determines whether an offense is a lesser-included offense of manslaughter in this situation. *E.g. Lawson v. State*, 64 S.W.3d 396, 396-97 (Tex. Crim. App. 2001); *Johnson v. State*, 4 S.W.3d 254, 255 (Tex. Crim. App. 1999).

The majority concluded that the analysis should be different here because a felony-murder indictment necessarily does not allege manslaughter (which is statutorily prohibited) and so resolution of the question of whether an offense is a lesser-included offense of manslaughter views manslaughter in this context as a "hypothetical" offense. *See Fraser*, 2019 WL 4308659, at *4. The majority concluded that the hypothetical nature of manslaughter in this context suggests that only the statutory elements of

manslaughter and the proposed lesser-included offense should be considered. *Id.*

The Cognate-Pleadings Analysis Should Apply

Appellant certainly agrees that the analysis involves an additional step than a standard cognate-pleadings analysis because manslaughter is not in fact alleged in the indictment. Yet this should not change the manner in which the analysis is ultimately performed.

Rather, the appropriate manner of conducting the analysis is to construct a hypothetically-correct manslaughter charge that incorporates the elements and descriptive averments in the felony-murder indictment. *Cf. Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997) (defining requisites of hypothetically correct jury charge). For example, the hypothetically-correct manslaughter charge here would be that Appellant recklessly caused the death of a child by administering diphenhydramine to Clara Felton.

The majority posited several rhetorical questions to bolster its conclusion that the cognate-pleadings analysis does not apply to a felony-murder indictment.

- Why would we use the indictment to add extra elements to a lesser-included offense when a lesser-included offense is not expected to have all of the elements in the indictment in the first place?

- And even viewing manslaughter as a hypothetical offense rather than a lesser-included offense, why would it need to import extra elements from the indictment?

- If one element of the predicate felony can be added to the hypothetical offense of manslaughter, why not all elements of the predicate felony?

Id.

But Appellant respectfully suggests that the answers to these questions do not inexorably lead to the result reached by the majority.

To begin with, the State chooses the language to use in an indictment. The indictment defines the scope of the offense for which a defendant is tried. And trial and appellate courts are bound by the allegations of the indictment. They may not add to or subtract from those allegations.

The allegations of the indictment, including both statutory elements and "descriptive averments," are considered when determining whether an offense is a lesser-included offense of that alleged in the indictment. *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (per curiam) (op. on reh'g). So the question is not whether a court "add[s] extra elements" from the indictment to the lesser-included offense. Rather, the question is whether the indictment incorporates additional statutory elements and descriptive averments that the elements of the proposed lesser-included offense fit

within. Here, the indictment alleges that the victim was a child because the underlying felonies were injury to a child and child endangerment. The Court would not be "adding extra elements" here because Appellant's complaint is based on the actual allegations of the indictment.

Regarding "why" the hypothetically-correct manslaughter offense would "need to import extra elements from the indictment," the allegations of the indictment define the scope of the charges against the defendant. And although the identity of the victim as a child is not a statutory element of manslaughter, when a felony-murder indictment alleges homicide against a child, the hypothetically-correct manslaughter indictment should also include this allegation. *Cf. Byrd v. State*, 336 S.W.3d 242, 251-55 (Tex. Crim. App. 2011) (State bound by erroneous allegation of victim's name in information even though not a statutory element of theft).

Finally, the majority posed the rhetorical question of why all elements of the predicate felony should not be incorporated into the hypothetically-correct manslaughter charge. And the short answer is that they should not. Rather, the hypothetically-correct manslaughter charge would incorporate any particulars alleged regarding the victim (such as status as child) and allegations regarding the manner and means of death.

Instead, the majority concludes that "doing so would nullify the felony-murder statutes by making all felonies ineligible." But this is inaccurate hyperbole. The universe of felony offenses to which Appellant's proposal would apply is actually quite small. The only applicable felonies would be those involving victims who are: (1) children; (2) elderly; (3) disabled; (4) family or household members; or (5) public servants; and only when the underlying felony permits conviction for reckless or criminally negligent conduct. This list of offenses includes: (1) assault of a family or household member or public servant (section 22.01); (2) injury to a child, elderly or disabled individual (section 22.04); or (3) child endangerment (section 22.041).

Appellant's interpretation of the felony-murder statute operates to disallow a conviction for felony-murder when the actor has engaged in the conduct constituting the underlying felony while acting recklessly or with criminal negligence. Stated differently, a person should not be subject to prosecution for felony-murder by recklessly engaging in conduct that results in a person's death (or by doing so with criminal negligence). *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.5(g) (2d ed. 1986) (if felony-murder applied to reckless homicides, "manslaughter has ceased to

exist as a separate crime; all manslaughters ride up an escalator to become felony-murders") (quoted with approval in *Lawson v. State*, 64 S.W.3d 396, 398 n.5 (Tex. Crim. App. 2001) (Cochran, J., concurring)). Unfortunately, the majority's construction permits this very thing.

Appellant is not asking the Court to consider all offenses under the aforementioned statutes as being potential lesser-included offenses of manslaughter in the felony-murder context. Rather, when such offenses are alleged to have been committed intentionally or knowingly, then they cannot be lesser-included offenses of manslaughter. *Cf. Lawson*, 64 S.W.3d at 397 (intentional or knowing aggravated assault not lesser-included offense of manslaughter). Conversely, when such offenses are committed recklessly or with criminal negligence, then they can be.

For these reasons, Appellant asks the Court to grant rehearing and reconsider its holding that the cognate-pleadings analysis does not apply to the manslaughter exclusion in the felony-murder statute.

Felony-Murder Requires a Separate Act

The Court granted the State's sole ground for review in this appeal.

> Can the felonies of reckless or criminally negligent injury to a child or reckless or criminally negligent child endangerment underlie a felony-murder conviction when the act underlying

> the felony and the act clearly dangerous to human life are one and the same?

In *Garrett v. State*, 573 S.W.2d 543 (Tex. Crim. App. 1978), this Court held that the felony-murder statute requires the act clearly dangerous to human life to be a different act than the conduct comprising the underlying felony. *Id.* at 546. This principle became known as the "merger doctrine." And the Court granted review of an issue that looks a lot like the issue addressed in *Garrett*. But the majority mentions this issue only in a footnote. *See Fraser*, 2019 WL 4308659, at *5 n.40.

The majority discusses the so-called merger doctrine in footnote 40 by essentially observing that this issue has already been decided and by criticizing the dissent for not addressing the "attempt" language in the felony-murder statute. *Id.*

But questions have persisted about whether the merger doctrine has survived. *E.g. Lawson*, 64 S.W.3d at 401 (Cochran, J., concurring). And it seemed that the Court intended to address this question by the wording of the ground for review it granted. However, the majority opinion fails to fully address the issue, relegating it instead to a perfunctory footnote.

Judge Slaughter's dissent, by contrast, addresses the issue directly and thoroughly. And the majority's critique of her dissent with regard to the "attempt" language is inaccurate. Judge Slaughter's dissent does reference that language.

Section 19.02(b)(3) provides that a person commits felony-murder if he:

> commits **or attempts to commit** a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits **or attempts to commit** an act clearly dangerous to human life that causes the death of an individual.

TEX. PEN. CODE § 19.02(b)(3) (emphases added).[1]

In reviewing the legislative history of the statute, Judge Slaughter quoted from the commentary accompanying the Final Draft proposed by the Governor's State Bar Committee on Revision of the Penal Code.

> Although it may contract the scope of the [former Texas] felony murder doctrine, the chief aim of Section 19.02(a)(3) is clarification. *Under it the mere attempt or commission of a felony no longer suffices to imply intent or knowledge: the actor must kill while attempting or committing an act clearly dangerous to human life in the course or furtherance of the felony or in immediate flight therefrom.*

[1] While likely an oversight, the majority opinion omits the second highlighted phrase from its quotation of the relevant statute in footnote 40.

Fraser, 2019 WL 4308659, at *26 (Slaughter, J., dissenting) (footnote omitted) (quoting State Bar Committee on Revision of the Penal Code, TEX. PENAL CODE, A PROPOSED REVISION (Final Draft, 1970) at 148).

The analysis is the same regardless of whether the death results from a completed underlying felony offense or an attempted commission of such offense and regardless of whether the actor commits an act clearly dangerous to human life or attempts to commit such an act.

The felony-murder statute requires:

1) commission or attempted commission of an underlying felony; and (separately)

2) commission or attempted commission of an act clearly dangerous to human life that causes the death of an individual; and

3) the commission or attempted commission of the "clearly dangerous act" must be (a) in the course of and in furtherance of the commission or attempted commission of the underlying felony, or (b) in immediate flight from the commission or attempted commission of the underlying felony.

Any criticism of Judge Slaughter's dissent as "writing out" the "attempt" language is inaccurate. Though it is true that she did not devote an extensive discussion to the "attempt" language, this does not change the fact that considering and applying the "attempt" language fails to undermine her analysis.

Judge Slaughter performed an extensive analysis that capably demonstrates why this Court has strayed from the plain meaning and original intent of Texas's felony-murder statute.[2]

The majority also criticizes Judge Slaughter's analysis as potentially excluding "many legitimate felony-murder prosecutions involving the underlying offenses of arson and criminal mischief." *See Fraser*, 2019 WL 4308659, at *5 n.40. Yet the question of "legitimacy" is a morality- or value-based question that strays from this Court's obligation to apply the plain language of the statute. If a proper interpretation of the felony-murder statute operates to exclude certain felonies from supporting a felony-murder prosecution, then it behooves the Legislature to make any amendments that body deems "legitimate."

---

[2] Judge Walker essentially agrees with Judge Slaughter's analysis in his concurring opinion but concludes that Appellant's conviction should nevertheless be affirmed because of the extraneous-conduct evidence admitted regarding other children in Appellant's daycare. *See Fraser v. State*, No. PD-0711-17, 2019 WL 4308659, at *7-15 (Tex. Crim. App. Sept. 11, 2019) (Walker, J., concurring). But this evidence was admitted for limited purposes. (6RR75-76). Judge Walker acknowledges that evidence admitted for a limited purpose cannot be considered by an appellate court in evaluating evidentiary sufficiency but suggests that the extraneous-conduct evidence here was not limited in a manner that prevents its consideration on appeal. *Id.*, 2019 WL 4308659, at *13. Appellant respectfully disagrees. Appellant also respectfully disagrees with Judge Walker's suggestion that the vague nature of the allegations regarding injury to a child and child endangerment authorize this Court to consider the extraneous-conduct evidence in evaluating evidentiary sufficiency. This is particularly so because the extraneous-conduct evidence was offered for limited purposes.

It is not this Court's function to decide which offenses give rise to a so-called "legitimate" felony-murder case. Rather, this Court must confine itself to an analysis of the statutory text and relevant authorities to determine whether the allegations of the indictment support a felony-murder prosecution where the indictment does not allege (and the evidence does not show) the commission of an act separate and apart from the act that constitutes the underlying felonies.

For these reasons, Appellant asks the Court to grant rehearing and fully address the continuing viability of the so-called merger doctrine or, alternatively, overrule those cases which have limited or criticized the merger doctrine.

Appellant Marian Fraser asks that the Court: (1) request a response to this Motion; (2) grant rehearing; and (3) grant such other relief to which she may show herself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
E. Alan Bennett
Counsel for Appellant
SBOT #02140700

Sheehy, Lovelace & Mayfield, P.C.
510 N. Valley Mills Dr., Ste. 500
Waco, TX 76710
Telephone: (254) 772-8022
Fax: (254) 772-9297
Email: abennett@slm.law

Certificate of Compliance

The undersigned hereby certifies, pursuant to Rule of Appellate Procedure 9.4(i)(3), that this computer-generated document contains 2,467 words.

/s/ Alan Bennett
E. Alan Bennett

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this document has been served by e-service on September 26, 2019 to: (1) counsel for the State, David Richards, CCAappellatealerts@tarrantcountytx.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett